83-661

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

UNITED STATES OF AMERICA

Plaintiff/Respondent

vs.

WILLIAM ROBERT SHOUN

Defendant/Petitioner

ON APPLICATION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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QUESTION FOR REVIEW

In a criminal conspiracy trial where the government attempts to introduce hearsay statements of an alleged co-conspirator pursuant to Federal Rules of Evidence 801(2)(E) over the objection of the defendant, may the court consider the contested statements themselves to make the threshhold determination of admissibility pursuant to Federal Rules of Evidence 104(a).

OPINION BELOW

This petition for Writ of Certiorari is from an unreported opinion of the United States Court of Appeals for the Sixth Circuit filed July 27, 1983 affirming the conviction of the defendant-Petitioner for conspiracy to import Schedule II

narcotics (28 USC §960)

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 27, 1983. (Appendix pp 1-26 infra). A petition for rehearing en banc was denied on August 19, 1983. (Appendix p 27 infra). The jurisdiction of this Court is invoked under 29 U.S.C. § 1254(1).

RULES INVOLVED

Federal Rules of Evidence 801 provides

The following definitions apply under this article:

> (a) Statement. A "statement" is (1) an oral or written assertion of (2) nonverbal conduct of a person, if it is intended by him as an assertion.
>
> (b) Declarant. A "declarant" is a person who makes a statement.

(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) Statements which are not hearsay. A statement is not hearsay if -

(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive, or (C) one of identification of a person made after perceiving him; or

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C)

a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship or (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

Federal Rules of Evidence 104 provides:

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisons of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges: (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. (c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases

be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

(d) Testimony by accused. The accused does not, by testifying upon a preliminary matter, subject himself to cross-examination as to other issues in the case.

(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.

STATEMENT OF THE CASE

Petitioner, William Robert Shoun, was arrested on July 16, 1982 by agents of the Federal Bureau of Investigation and subsequently indicted by the Federal Grand Jury on two counts alleging violations of 21 USC §960, conspiracy to import Schedule II narcotics and 21 USC §846, conspiracy to distribute Schedule II narcotics. After a jury trial on

September 14-16, 1982, Petitioner was convicted on Count 1 of the indictment, violation of 21 USC §960 and was acquitted of Count 2 of the indictment. He subsequently received a sentence of five years in the federal penitentiary. Notice of Appeal to the United States Court of Appeals for the Sixth Circuit was filed on October, 18, 1982. Oral argument was presented on June 7, 1983 and the Court issued its opinion affirming the trial court's decision on June 27, 1983. A Petition for Rehearing en banc or alternatively for a rehearing was filed on July 14, 1983. The Order of the United States Court of Appeals for the Sixth Circuit denying the Petition to rehear was entered on August 19, 1983.

ARGUMENT

It is the uniform rule that the question of alleged, and otherwise hearsay, co-conspirator statements is for the determination of trial court independent of and prior to the submission of the case to the jury. See eg. United States v. Enright, 579 F2d 980 (6th Cir. 1978). United States v. Petrozziello, 548 F2d 20 (1st Cir. 1977). In United States vs. Vinson, 606 F.2d 149 (6th Cir. 1979) the United States Court of Appeals for the Sixth Circuit went further and established guidelines for the Trial Court's to use in making this preliminary finding and also ruled that the Trial Court could consider the hearssay itself in making it's ruling. Vinson at 152-3. The

Sixth Circuit based its ruling that the statements themselves could be considered in determining their admissibility on an evaluation of Fed. R. Evid. 104(a), which states in its final sentence that the judge "...is not bound by the rules of evidence...", holding that this amendment "...modifies prior law to the contrary." Vinson at 153. The fact is that no Circuit other than the Sixth Circuit permits the unrestricted use of the contested statements themselves in determining their admissibility. The majority of the Circuits require the use of "independent" evidence. See eg. United States v. Janowski, 713 F2d. 394 (8th Cir. 1983); United States v. Robinson, 707 F2d. 811 (4th Cir. 1983);

United States v. Xheka, 704 F2d. 974 (7th Cir. 1983); United States v. Fernadez-Rogue 703 F2d. 808 (5th Cir. 1983); United States v. Gibbs, 703 F2d 683 (3rd Cir. 1983); United States v. Monaco, 702 F2d. 860 (11th Cir. 1983); United States v. Monaco, 700 F2d. 577 (10th Cir. 1983); United States v. Cawley, 630 F2d. 1345 (9th Cir. 1980), with the Second Circuit going even further in their ruling and requiring that the independent evidence itself must be non-hearsay in nature. United States v. Terry, 702 F2d. 299 (2d Cir. 1983). The only circuit which arguably follows the same rule as the Sixth Circuit is the First Circuit which noted without actually deciding the issue in the case of United States v. Petroziello,

548 F2d 20 (1st Cir. 1977) that arguably such statements could be considered under the rules but went further to say that such evidence should be given little, if any, weight. Petrozziello at 23 n2.

The use of the contested statements themselves in making a determination as to their admissibility is improper and contrary to the majority rule. The more appropriate ruling would be to require that the government establish the requisite predicate to admissibility by independent evidence. The danger in permitting the use of the contested statements themselves is that of "bootstrapping" which this court has previously indicated should be avoided when it stated,

> "...such declarations [co-conspirator hearsay statements] are admissible over the objection of an alleged co-conspirator who was not present when they were made, only if there is proof aliunde that he is connected with the conspiracy. [citation omitted] Otherwise hearsay would lift itself by its own bootstraps to the level of competent evidence."

Glasser vs. United States 315 U.S. 60 at 74 (1942).

The holding of the Sixth Circuit in Vinson appears to reflect a belief, although not actually so stating, that this Court's ruling in Glasser has been overruled by the subseqent adoption and amendment of the Federal Rules of Evidence and particularly Rule 104(a). This however is not, or should not be, the case. The better rule would be to allow the use of any independent testimony either hearsay or non-hearsay in making the

preliminary determination concerning admissibility.

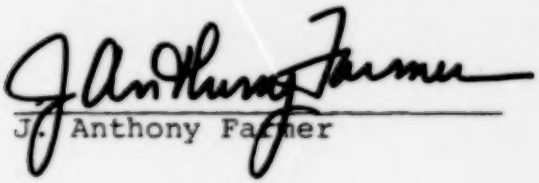
The question presented is one of great importance in the administration of criminal justice. The numerous decisions on the subject, only some of which have been cited, indicate the frequency in which the issue is raised both at the trial and appellate levels. The current conflict between the circuits creates a situation in which a defendant faces different standards depending on the jurisdiction in which he is brought to trial. Further, the holding of the United States Court of Appeals for the Sixth Circuit in Vinson and the instant case is contrary to the ruling of the court in Glasser, a ruling which has not been overruled, and as such merits the review by

this Court.

CONCLUSION

It is respectfully submitted for the foregoing reasons that this application for writ of certiorari should be granted.

Respectfully Submitted,



J. Anthony Farmer

PROOF OF SERVICE

I, J. Anthony Farmer, one of the attorneys for William Robert Shoun, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 17th day October, 1983, I served copies of the foregoing Application for writ of certioriari to The Supreme Court of the United States, on John Gill, Esq., United States Attorney for the Eastern District of Tennessee, and the Solicitor General, Department of Justice, Washington, D.C., by mailing copies of the same in duly addressed envelopes with postage prepaid to their respective addresses.

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APPENDIX

No. 82-5628
82-5639
82-5641

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. O R D E R

WILLIAM ROBERT SHOUN, (82-5628)
REBA JOYCE REAGAN, (82-5639)
RAY OWNBY, (82-5641)

Before: KEITH and KENNEDY, Circuit Judges; and McRAE,* District Judge:

Defendants Reagan and Ownby Appeal their convictions of conspiracy to import and to distribute Schedule II narcotics in violation of 21 U.S.C. §§846, 960(1) and (3). Defendant

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*Honorable Robert M. McRae, United States District Court for the Western District of Tennessee, sitting by designation.

Shoun appeals his conviction of conspiracy to import Schedule II narcotics in violation of 21 U.S.C. §§846, 960 (1).

Defendants raise six distinct issues. The first two are joined in by all three defendants. The third issue is raised by Ownby alone and the remaining issues are raised only by Shoun. The six issues may be summarized as:

(1) Error in the trial court's instructions to the jury in that the District Judge a. refused to use the defendants' proffered instructions on conspiracy, including a charge that one cannot conspire with a government agent; b. failed to adequately instruct on "mere presence"; and c. included, to the defendants' prejudice, an instruction on the substantive offense of importing and distributing cocaine;

(2) The District Court's refusal to grant a continuance after all proofs had been submitted in order that defendants could investigate and produce newly discovered evidence that the government's star witness, Rothchild, had been a drug runner, thereby impeaching his credibility;

(3) The allowance of testimony which referred to the defendant's Ownby's prior bad acts as an experienced drug runner and the District Court's failure to provide cautionary instructions regarding this evidence;

(4) denial of Shoun's motion to sever his trial;

(5) admission of the hearsay statements of co-conspirators against Shoun;

(6) denial of Shoun's motion for a judgment of acquittal.

Finding that none of these issues merits reversal of defendants' convictions, we affirm.

On May 24, 1982, Nathan Rothchild was approached by defendant Reagan at Rothchild's restaurant and asked if he wanted to buy a large quantity of

cocaine. Rothchild, who was in the government's witness protection program at the time, reported this offer to the FBI. The FBI outfitted Rothchild with tape recording devices for his body, phone and business. The following day Reagan again met Rothchild. Rothchild agreed to buy 5 kilograms of cocaine at $50,000 each. Subsequently Rothchild agreed to purchase 1,000,000 quaaludes for $700,000. Reagan told Rothchild that only the lack of a plane suitable for transporting the drugs from South America prevented consummation of the deal. Following FBI instructions, Rothchild offered Reagan a Cessna 404 which he represented he could obtain through other "contacts". On June 9 Rothchild spoke with Ray Ownby on the phone about securing a plane. On June

19 Rothchild accompanied Reagan to Florida where they met Ownby. The next day Ownby apparently explained to Rothchild the "procedures" for telephone contacts and landings in South America. He also stated that he had made 25 or 30 prior trips to Columbia and that Bob Shoun was his "co-pilot." There were numerous conversations both by phone and in person between Reagan, Ownby and Rothchild. On July 1 Reagan and Rothchild visited a safety deposit box in Kingston Pike, Tennessee and viewed $250,000 in "good faith" money. On July 14 Rothchild agreed with Ownby that Rothchild would provide a plane for $10,000 plus $1,000 per hour for its use. On July 16 defendant Shoun made his first appearance when Ownby brought Shoun to Rothchild's restaurant.

Rothchild asked Shoun if Shoun intended to go with Ownby to South America; Shoun replied "yes." All three men then viewed the "good faith" money in the Kingston Pike safety deposit box. They subsequently visited the plane which an undercover FBI agent had just flown in, posing as its operator. The plane is capable of reaching Columbia and returning without refueling. Rothchild asked the agent if he realized the plane would be used to transport drugs--apparently in the presence of Shoun and Ownby. The agent answered that he was. When Shoun was asked if he intended to fly the plane he replied, "I guess." Shoun later stated he definitely was not going to fly the plane and left. He also refused to sign the lease. Reagan, Ownby and

Shoun were convicted by the jury of conspiring to import Schedule II narcotics. Reagan and Ownby were also convicted of conspiracy to distribute this contraband.

I. Jury Instructions

All three defendants assert that the District Court erred by refusing to utilize jury instructions they had submitted on the elements of conspiracy. The trial court is not required to give a requested jury instruction if the subject matter of that instruction is substantially covered by the court's actual charge to the jury. See United States v. Herron, 551 F.2d 1073, 1076 (6th Cir. 1977). There is no error in refusing a defendant's proposed instruction unless the trial court's actual instruction, considered as a

whole, fails to instruct on the principles tendered by the defendant, Id.; United States v. Carabbia, 381 F.2d 133, 138 (6th Cir.) cert. denied, 389 U.S. 1007 (1967). We find the District Court's instructions in this case to have been adequate.

The defendants first contend that the District Court erred by including instructions regarding the substantive offenses which were the object of the conspiracy. This argument is misplaced. The cases the defendants cite in support of their position, United States v. Carlson, 616 F.2d 446 (9th Cir. 1980) and United States v. Bizzard, 615 F.2d 1080 (5th Cir. 1980), are inapposite. Each involved instructions which broadened an indictment to allow

conviction for crimes with which the defendant was not charged. Here the District Court's instruction, which did not actually cover the elements of the substantive crime as such, specifically admonished the jury to "remember these two counts of the indictment are charged conspiracies. A conspiracy is charged in each count. One is to import and the other is to distribute contolled [sic] substances." From this and the remainder of the court's extensive instructions -- all of which are cast strictly and plainly in terms of conspiracy -- no reasonable juror could possibly have believed that the defendants were being charged with anything other than conspiracy. It appears that the court's charge here was merely intended to admonish that there

had to be a Schedule II narcotic as the end object of the conspiracy. Whether this was necessary or not, its inclusion could only have made a conviction less rather than more likely. If in error it was beyond a doubt harmless.

Defendants Ownby and Reagan assert error in the District Court's failure to instruct that one cannot conspire with a government agent who secretly intends to frustrate the purpose of the supposed criminal scheme. We disagree. The defendants simply did not produce any evidence which would have justified inclusion of the desired instruction. To the contrary, nearly all of the evidence in the record involves a coordinated scheme between Ownby, Reagan, Shoun and certain unknowns. Rothchild was a pivotal but

clearly integrated part of the defendants' partnership. Moreover, Rothchild was not named as a conspirator in the indictment before the jury or in the government's proofs at trial. Without an evidentiary basis for the defendants' hoped-for defense, there was no justification for the desired instruction and no error in its omission.

Finally, the defendants complain that the District Court's instructions failed to adequately instruct on the elements of conspiracy. Defendant Shoun also contends that the instruction given failed to inform the jury that "mere presence," knowledge or approval is not sufficient to establish a defendant's participation in the concerted illegal scheme.

See, e.g., United States v. DeSimone, 660 F.2d 532, 537 (5th Cir. 1981). However, none of the defendants provided the District Judge with specific objections to his instructions adequate to apprise the court of these supposed errors. Under Rule 30 of the Federal Rules of Criminal Procedure defendants must provide the trial court with an opportunity to correct any potential errors by making specific objections and detailing their bases. See United States v. Hamilton, 684 F.2d 380, 385 (6th Cir.) cert. denied, ____ U.S. _____, 103 S. Ct. 312 (1982). If a defendant fails to so preserve a claimed error this Court will only review for "plain error". See United States v. Erdman, 515 F.2d 290, 293 (6th Cir.

1975); United States v. Buffa, 527 F.2d 1164, 1165 (6th Cir. 1975). Because the defendants' assertions are not supported by the actual instruction tendered to the jury by the District Court, we find no such error in the present case. The instruction challenged must be examined as one part of the overall charge. See United States v. LaRiche, 549 F.2d 1088, 1092 (6th Cir. 1977). Here the court's charge carefully instructed on the elements of conspiracy and clearly stressed that each defendant had to be found to have willfully participated in the conspiracy with specific intent to achieve its criminal objective. Considered as a whole, the District Court's instructions adequately cover the principles asserted by the

defendants' proposed instructions.

2. Refusal to Grant a Continuance

The defendants assert that the District Court erred by refusing to a grant a continuance so that they could invewtigate and produce newly discovered evidence of Rothchild's past criminal activities and thereby impeach his crucial testimony. The request was made after the close of all of the evidence. The defendants sought the continuance after Reagan's counsel received a phone call in which the caller, who declined to testify or be identified, alleged that Rothchild had engaged in prior criminal activities and participated in the federal witness protection program.

We review a trial court's refusal to grant such a continuance on an abuse

of discretion standard. United States v. Boyd, 620 F.2d 129, 132 (6th Cir. 1980). In order to be entitled to the continuance on the basis of a previously unknown witness, the defendant must demonstrate that the witness would give substantial favorable evidence and be available and willing to testify. See id.; United States v. Medina-Arellano, 569 F.2d 349 (5th Cir. 1978). The defendants here were unable to satisfy either of these two criteria. The telephone caller refused to be identified or testify. In addition, the defendants have still not explained how Rothchild's prior participation in a witness protection program impeaches his credibility. Almost all of his testimony was corroborated by actual tape recordings of the conversations

he describes. See United States v. Marino, 685 F.2d 1120, 1125 (6th Cir. 1981). The trial court exercised sound discretion in denying the motion.

The defendants also moved for a new trial alleging that the government had withheld "Agurs-Brady" materials despite a specific request for such materials regarding the past record of Rothchild. See United States v. Agurs, 427 U.S. 97 (1976); Brady v. Maryland, 373 U.S. 83 (1963). In response the government admitted knowledge that Rothchild had previously participated in the witness protection program but pointed out that this was a result of previous testimony several years earlier and to its knowledge did not involve any criminal activities by

Rothchild. Since Rothchild's involvement in the program was not relevant to his credibility there was no obligation to provide that information. See Marino, 685 F.2d at 1125.

3. Prior Bad Acts of Ownby

The defendant Ownby contends that the District Court erred in allowing into evidence a number of references to Ownby's prior involvement in drug trafficking. These references were made by the government's star witness Rothchild and in taped conversations between Rothchild and defendant Reagan.

Under Fed. R. Evid. 404(b) prior bad acts are inadmissible to demonstrate propensity to commit crimes or bad character but may be introduced to show preparation, plan, opportunity and intent. United States v. Vincent,

681 F. 2d 462, 465 (6th Cir. 1982); United States v. Cooper, 577 F.2d 1079, 1088, cert. denied, 439 U.S. 868 (1978); United States v. Yopp, 577 F.2d 362, 366 (6th Cir. 1978); United States v. Faulkner, 538 F.2d 724, 728 (6th Cir.) cert. denied, 429 U.S. 1023 (1976). In the present case the references made to Ownby's prior experiences in the drug trade were used and relevant to those purposes. Even though admissible under Rule 404(b) such evidence may be nonetheless excluded under Rule 403 if its "probative value is substantially outweighed by the danger of unfair prejudice...." See United States v. Czarnecki, 552 F.2d 698, 702 (6th Cir.), cert. denied, 431 U.S. 939 (1977). This evaluation is a matter for the trial court's discretion. Id.; United

States v. Largent, 545 F.2d 1039 (6th Cir. 1976); Cooper, 577 F.2d at 1088. We do not believe that the District Court abused its discretion in allowing such testimony in the present case. The references made to Ownby's prior bad acts served to corroborate evidence relating to the securing of a plane and the purpose of the criminal enterprise. In light of the strength of other evidence supporting the findings of a conspiracy, allowance of these references to Ownby's past experience in the drug trade were not overly prejudicial.

Ownby also asserts that the District Court erred by failing to provide the jury with a cautionary instruction limiting the use of Ownby's prior bad acts. There was no request

for such an instruction. In accordance with Rule 30, the lack of a cautionary instruction here may, therefore, only result in reversal if it constitutes "plain error" affecting substantial rights of the defendant. See Vincent, 681 F.2d at 465; Yopp, 577 F.2d at 366; Cooper, 577 F.2d at 1089; Faulkner, 538 F.2d at 728. In the present case the evidence against Ownby concerning his involvement in the conspiracy was substantial. The references made to his prior acts were all incidental to conversations between the defendants and Rothchild concerning the planning and furtherance of the criminal enterprise. We do not believe that the references to Ownby's prior drug trafficking experiences could have affected the outcome of

trial. For these reasons, the lack of a cautionary instruction here did not constitute plain error.

4. Severance

On September 1, 1982, defendant Shoun moved for a severance of his trial from that of his co-defendants primarily on grounds that Ownby would provide exculpatory testimony in Shoun's behalf if separate trials were held. The District Court's denial of this motion is only reviewable for an abuse of discretion. See DeSimone, 660 F.2d at 539; United States v. Kendricks, 623 F.2d 1165, 1168 (6th Cir. 1980). There was no abuse of discretion in this case. To gain a severance under Rule 14 of the Federal Rules of Criminal Procedure based on the potential

exculpatory testimony of a co-defendant, the defendant must show (1) bona fide need; (2) the specific expulpatory nature and effect of such testimony; and, (3) that the co-defendant will testify. See DeSimone, 660 F.2d at 539-40. In order to satisfy these criteria the defendant must go beyond conclusory allegations and specifically describe the exculpatory nature of the testimony. See United States v. Richerfer, 647 F.2d 397 (3rd Cir. 1981). In the present case Shoun in his affidavit before the District Court stated only that Ownby would testify on Shoun's behalf and that the testimony would be exonerating. Without more of a showing by the defendant, the District Court did not abuse its discretion in denying the

motion.

5. Co-conspirator Hearsay Against Shoun

In this Circuit, hearsay statements by co-conspirators are admissible against each conspirator so long as the conspiracy and the defendant's involvement is established by a preponderance of the evidence. United States v. Vinson, 606 F.2d 149, 152-53 (6th Cir. 1979), cert. denied, 444 U.S. 1074 (1980). That hearsay itself may be considered by the District Court in making this determination. Id. Here the Court instructed the jury to disregard such hearsay evidence unless it found beyond a reasonable doubt that a conspiracy existed of which the defendant was a member. Such an instruction exceeds the requirements of Vinson in favor of the defendant.

6. Motion for Judgment of Acquittal

Finally, Shoun urges that the District Court erred by denying his motion for a judgment of acquittal. Shoun based this motion on the insufficiency of the evidence that he was an actual participant in the illegal scheme. In reviewing a decision on a motion for acquittal based upon the insufficiency of the evidence the court of appeals must view the evidence in the light most favorable to the government. Glasser v. United States, 315 U.S. 60 (1942); United States v. Mayes, 512 F.2d 637, 645 (6th Cir.) cert. denied, 442 U.S. 1008 (1975).

The evidence of Shoun's involvement in the conspiracy to import a controlled substance was sufficient to submit the issue to the jury. His

presence and participation at two critical junctures -- inspection of the plane and safety deposit box -- clearly corroborates the frequent references made about him by the other defendants. It is not relevant that Shoun's involvement appears to be lesser than that of the other conspirators. The court is not required to consider the degree of guilt, so long as there is sufficient evidence of the defendant's involvement to submit the issue to the jury. See United States v. Demetre, 461 F.2d 971, 974 (6th Cir. 1972). Proof of knowledge and intent can be circumstantial and inferential. United States v. Butler, 618 F.2d 411, 414 (6th Cir. 1980); United States v. Richardson, 596 F.2d 157, 161 (6th Cir. 1979).

The defendants' convictions are affirmed.

ENTERED BY ORDER OF THE COURT

_____

Clerk

No. 82-5628

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v. O R D E R

WILLIAM ROBERT SHOUN,

Defendant-Appellant.

Before: KEITH and KENNEDY, Circuit Judges; and McRAE,* District Judge:

The Court not having favored rehearing en banc in this case, the petition for rehearing is referred to our panel for disposition.

Upon consideration, IT IS ORDERED that the petition for rehearing be and hereby is DENIED.

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*Honorable Robert M. McRae, Chief Judge, United States District Court for the Western District of Tennessee, sitting by designation.

ENTERED BY ORDER OF THE COURT

_____

Clerk

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CLERK

No. 83-661

In the Supreme Court of the United States

OCTOBER TERM, 1983

WILLIAM ROBERT SHOUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether there was sufficient evidence of the existence of a conspiracy to permit the admission of out-of-court statements of co-conspirators.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-661

WILLIAM ROBERT SHOUN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 1-26) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1983. A petition for rehearing (Pet. App. 27-28) was denied on August 19, 1983. The petition for a writ of certiorari was filed on October 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted of conspiracy to import cocaine and quaaludes, schedule II narcotics, in violation of 21 U.S.C. 846 and

960(1). Petitioner was sentenced to five years' imprisonment. The court of appeals affirmed (Pet. App. 1-26).

1. The evidence at trial, as reflected in the opinion of the court of appeals, showed that on May 24, 1982, petitioner's co-defendant Reba Joyce Reagan[1] asked Nathan Rothchild if he were interested in purchasing a large quantity of cocaine (Pet. App. 3). Rothchild, who was already a participant in the federal government's witness protection program, reported the offer to the FBI (*id.* at 4). The FBI provided Rothchild with recording devices and asked him to pursue the offer further and record any conversations that he could (*ibid.*).

Subsequently, Rothchild agreed to purchase from Reagan five kilograms of cocaine for $250,000 and one million quaaludes for $700,000 (Pet. App. 4). Reagan later told Rothchild that delivery of the drugs was being delayed because Reagan lacked an airplane suitable for transporting the drugs from South America (*ibid.*). Rothchild, acting on FBI instructions, offered to lease to Reagan a Cessna 404 capable of reaching Colombia and returning to the United States without refueling (*id.* at 4, 6).

On June 9, Rothchild spoke with petitioner's other co-defendant, Ray Ownby, about the plane (Pet. App. 4). Ownby claimed that he had made 25 or 30 prior trips to Colombia and that petitioner had been his copilot (*id.* at 5). Rothchild agreed to lease the plane for $10,000 plus $1,000 per hour for its use (*ibid.*).

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[1] Petitioner was tried jointly with Reagan and Ray Ownby. They were also convicted of conspiracy to import narcotics in violation of 21 U.S.C. 846, 960(1) and (3) (Pet. App. 1). Their convictions were affirmed in the same order affirming petitioner's conviction (Pet. App. 1-26), but they have not sought review of that judgment by this Court.

On July 16, Ownby and petitioner (Pet. App. 5-6; Tr. 109) visited Rothchild (Pet. App. 5). Rothchild asked petitioner if he intended to go with Ownby to South America and petitioner replied "yes" (*id.* at 6). In petitioner's presence, Ownby told Rothchild that petitioner had several thousand hours of flying experience and that petitioner would be doing most of the flying (Tr. 111).

The three men then proceeded to the Park National Bank, Bearden Branch, to look at Rothchild's "good faith" money (Pet. App. 6). Thereafter, they went to the Island Home Airport for the purpose of inspecting the plane that Rothchild had obtained; the plane had just been flown in by an FBI agent posing undercover as its operator. Rothchild asked the agent while petitioner was present if the agent were aware that the plane was to be used to transport drugs. The agent told him that he knew that, and asked if petitioner would be the pilot. Petitioner indicated that he "guess[ed] so" (*ibid.*).

2. The district court found by a preponderance of the evidence that the conspiracy existed, that the declarants and petitioner were members of the conspiracy and that the statements were made in furtherance of the conspiracy (Tr. 66, 135, 405-406). The record did not show whether the district court considered the co-conspirator statements themselves when making these determinations. The district court, however, instructed the jury to disregard all hearsay statements unless the jury found beyond a reasonable doubt that a conspiracy existed and that petitioner was a member of it (Pet. App. 23).

The court of appeals affirmed (Pet. App. 1-26). With regard to the admissibility of the co-conspirators' statements, the court noted that under its prior holding in *United States* v. *Vinson*, 606 F.2d 149 (1979), cert. denied, 444

U.S. 1074 (1980), the evidence is admissible if the conspiracy and the defendants' involvement in it are proved by a preponderance of the evidence, *including* the co-conspirator's statements. The court pointed out, however, that the district court's instruction to the jury exceeded the requirements of the rule in *Vinson* and therefore the co-conspirator statements were clearly admissible in this case (Pet. App. 23).

ARGUMENT

Petitioner challenges (Pet. 10) the district court's admission of unspecified statements made by his co-conspirators. He argues that the evidentiary predicate for the admission of such statements in the Sixth Circuit differs from the standard used by other courts of appeals, which exclude the co-conspirators' statements in deciding whether a conspiracy has been proved by a preponderance of the evidence. See, *e.g.*, *United States* v. *Nardi*, 633 F.2d 972, 974 (1st Cir. 1980).[2] This case, however, is not an appropriate vehicle for resolving whatever conflict may exist on this issue, because there was ample independent evidence in this case to establish the existence of a conspiracy and petitioner's participation in it, as well as relatively little evidence admissible solely as co-conspirator declarations. It is therefore clear that the statements at issue in this case would have been admissible under the test employed by any court.

It is well established that petitioner's own admissions, such as his statement that he was to be the pilot, may be considered as independent evidence of petitioner's role in the conspiracy. *E.g.*, *United States* v. *Roe*, 670 F.2d 956, 963 (11th Cir. (1982)), cert. denied, No. 81-7000 (Oct. 4, 1982). Other independent evidence of petitioner's involvement in the conspiracy included petitioner's statements

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[2]This Court recently denied a petition for a writ of certiorari on this precise issue in *Arnott* v. *United States*, No. 82-2028 (Oct. 31, 1983).

on July 16, 1982, in Rothchild's restaurant that he would be co-piloting the plane to South America, petitioner's visit to the bank with Rothchild and Ownby to view Rothchild's "good faith" money, and petitioner's presence with Rothchild and Ownby at the airport to inspect the plane (Pet. App. 4-5).

Other incriminating testimony included the statements made by others in petitioner's presence regarding his use of the plane to transport drugs, which would appear to constitute adoptive admissions under Fed. R. Evid. 801(d)(2)(B). See *United States* v. *Alvarez-Porraz*, 643 F.2d 54, 57-58 (2d Cir.), cert. denied, 454 U.S. 839 (1981). Accordingly, those statements also would properly be considered by any court in determining the existence of the conspiracy and petitioner's involvement in it (*ibid.*). See also *United States* v. *Batimana*, 623 F.2d 1366, 1369 (9th Cir.), cert. denied, 449 U.S. 1038 (1980); *United States* v. *Hoosier*, 542 F.2d 687, 688 (6th Cir. 1976). Indeed, petitioner does not specify what statements he believes were inadmissible or how those statements could possibly have prejudiced his defense in light of the substantial, properly admitted evidence of his involvement in the conspiracy.[3] Since it is plain that petitioner's conviction would not have been overturned under

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[3]We note that the jury was instructed that before considering the co-conspirator statements, it had to find beyond a reasonable doubt that a conspiracy involving petitioner existed and that the statements were in furtherance of the conspiracy (Tr. 426). This instruction was an unwarranted windfall for petitioner, since the admissibility issue should be decided by the court and not under a reasonable doubt standard. See *United States* v. *Enright*, 579 U.S. 980, 986-987 (6th Cir. 1978); *United States* v. *Nickerson*, 606 F.2d 156, 158 (6th Cir.), cert. denied, 444 U.S. 994 (1979); *United States* v. *Mastropieri*, 685 F.2d 776, 790 (2d Cir. (1982)), cert. denied, No. 82-454 (Oct. 18, 1982). The fact that the jury nevertheless convicted petitioner is an indication of how substantial the government's independent evidence of the conspiracy was in this case.

any standard regarding the admissibility of co-conspirator statements, it would be inapproprite to review the validity of the Sixth Circuit's *Vinson* rule in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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